



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

DECISION

FCP/148206

PRELIMINARY RECITALS

Pursuant to a petition filed March 22, 2013, under Wis. Admin. Code § DHS 10.55, to review a decision by the Milwaukee County Department Family Care - MCO in regard to Medical Assistance, a hearing was held on August 26, 2013, at Milwaukee, Wisconsin.

The issue for determination is whether the Milwaukee County Department of Family Care correctly determined Petitioner's Level of Care and whether it correctly terminated Petitioner's Non-Medical Transportation Services.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street
Madison, Wisconsin 53703

By: Lillian Alford, Quality Improvement Coordinator
Milwaukee County Department Family Care - MCO
901 N 9th St
Milwaukee, WI 53233

ADMINISTRATIVE LAW JUDGE:

Mayumi M. Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County.

2. Petitioner suffers from arthritis, chronic fatigue, Chronic Obstructive Pulmonary Disease/Emphysema, Chronic Bronchitis, Asthma, Anxiety Disorder, Depression, Bi-Polar Disorder, Anti-Social Personality Disorder, Post-Traumatic Stress Disorder and Drug Dependence. (Exhibit 6, pg. 9; Exhibit 7)
3. On March 8, 2013, the Milwaukee County Department of Family Care (the agency) sent Petitioner a notice indicating that his level of care changed and that he no longer met the Nursing Home level of care. (Exhibit 5, pg. 4)
4. On March 8, 2013, the agency also sent Petitioner a notice indicating, effective March 26, 2013, that it was terminating his non-medical transportation services, because of the change in his level of care. The notice further asserts that the agency had a conversation about this with Petitioner on March 11, 2013. (Exhibit 5, pg. 9)
5. Petitioner filed a request for fair hearing that was received by the Division of Hearings and Appeals on March 22, 2013. (Exhibit 1)

DISCUSSION

The terms “nursing home level of care” and “non-nursing home level of care” are given general definitions in Wis. Stats §46.286(1)(a):

- (a) Functional eligibility.** A person is functionally eligible if the person's level of care need, as determined by the department or its designee, is either of the following:
- 1m.** The nursing home level, if the person has a long-term or irreversible condition, expected to last at least 90 days or result in death within one year of the date of application, and requires ongoing care, assistance or supervision.
 - 2m.** The non-nursing home level, if the person has a condition that is expected to last at least 90 days or result in death within 12 months after the date of application, and is at risk of losing his or her independence or functional capacity unless he or she receives assistance from others.

In further defining levels of care for the Family Care Program, Wis. Admin. Code §10.33(2)(c) and (d) refers to “nursing home level of care” as “Comprehensive functional capacity” and it refers to “non-nursing home level of care” as “intermediate functional capacity”:

Comprehensive functional capacity level. A person is functionally eligible at the comprehensive level if the person requires ongoing care, assistance or supervision from another person, as is evidenced by any of the following findings from application of the functional screening:

1. The person cannot safely or appropriately perform 3 or more activities of daily living.
2. The person cannot safely or appropriately perform 2 or more ADLs and one or more instrumental activities of daily living.
3. The person cannot safely or appropriately perform 5 or more IADLs.
4. The person cannot safely or appropriately perform one or more ADL and 3 or more IADLs and has cognitive impairment.
5. The person cannot safely or appropriately perform 4 or more IADLs and has cognitive impairment.
6. The person has a complicating condition that limits the person's ability to independently meet his or her needs as evidenced by meeting both of the following conditions:
 - a. The person requires frequent medical or social intervention to safely maintain an acceptable health or developmental status; or requires frequent changes in service due to intermittent or unpredictable changes in his or her condition;

or requires a range of medical or social interventions due to a multiplicity of conditions.

- b. The person has a developmental disability that requires specialized services; or has impaired cognition exhibited by memory deficits or disorientation to person, place or time; or has impaired decision making ability exhibited by wandering, physical abuse of self or others, self-neglect or resistance to needed care.

Intermediate functional capacity level. A person is functionally eligible at the intermediate level if the person is at risk of losing his or her independence or functional capacity unless he or she receives assistance from others, as is evidenced by a finding from application of the functional screening that the person needs assistance to safely or appropriately perform either of the following:

- 1. One or more ADL.
- 2. One or more of the following critical IADLs:
 - a. Management of medications and treatments.
 - b. Meal preparation and nutrition.
 - c. Money management.

Petitioner filed an appeal, because he disagreed with the agency's determination that his level of care had dropped from nursing home level of care to non-nursing home level of care and because he disagreed with the subsequent termination of his non-medical transportation services.

It is a well-established principle that a moving party generally has the burden of proof, especially in administrative proceedings. State v. Hanson, 295 N.W.2d 209, 98 Wis. 2d 80 (Wis. App. 1980). In other words, the party wishing to change the status quo bears the burden of proof. In a case involving a change in level of care or a termination of services, the agency bears the burden to prove it acted correctly.

Because Petitioner was with a different Care Management Unit, the agency was unable to provide a copy of the Long Term Care Functional Screen that formed the basis of the March 8, 2013 notice advising Petitioner that his level of care changed. Because the agency did not produce that screen and presented to no testimony from the individual or individuals who completed that screen, it does not have sufficient evidence to prove that the agency acted correctly in March 2013.

The agency conducted another Long Term Care Functional Screen in April 2013, which also found Petitioner to be at the non-nursing home level of care, but was unable to explain why Petitioner's situation improved so drastically, that his level of care would have changed. On the contrary, when comparing Petitioner's diagnoses listed in the April 2013 Long Term Care Functional Screen with his diagnoses listed in the July 2012 Long Term Care Functional Screen, it would appear that his health has deteriorated. Between those dates, he developed COPD and bi-polar disorder. (See Exhibits 6 and 7) At the hearing, Jennifer Zurawski, a Family Care R.N. who conducted a "re-screen" in June 2013 that was based on the April 2013 Long Term Care Functional Screen, testified that the April 2013 screen was probably not accurate, because it was based upon the incorrect belief that Petitioner's ex-wife would be providing informal supports to him.

CONCLUSIONS OF LAW

- 1) The agency did not correctly determine Petitioner's level of care, effective March 8, 2013.
- 2) The agency did not correctly terminate Petitioner's non-medical transportation, effective March 26, 2013.

THEREFORE, it is

ORDERED

That the agency reinstate Petitioner at the nursing home level of care effective March 8, 2013 and that it reinstate Petitioner's non-medical transportation effective March 26, 2013. The agency shall take all administrative steps necessary to accomplish these tasks within ten-days of this decision.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 17th day of September, 2013.

\sMayumi M. Ishii
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on September 17, 2013.

Milw Cty Dept Family Care - MCO
Office of Family Care Expansion